SYARIKAT LIAN PING ENTERPRISE SDN BHD

v.

CYGAL BHD

HIGH COURT MALAYA, KUALA LUMPUR
ARIFIN JAKA J
[COMPANIES (WINDING-UP) NO: D3-28-54-1998]
31 DECEMBER 1999

COMPANY LAW: *Winding up - Petition - Application to strike out petition - Whether debt bona fide disputed - Whether petitioner a creditor - Whether petitioner had locus standi to issue notice of demand and petition - Effect of arbitration proceedings between parties - Injunction - Companies Act 1965, ss. 217, 218*

The petitioner filed a petition to wind up the respondent company on the ground that it was just and equitable to wind up the respondent as it was unable to settle the amount claimed under the s. 218 notice issued by the petitioner. In response, the respondent filed the instant application by way of notice of motion, seeking an injunction to restrain the petitioner from pursuing the petition and to strike out the petition, on the grounds that the respondent disputed the alleged debt and because there was a pending arbitration to settle the disputes between the parties.

Held:

[1] The petitioner lacked the *locus standi* to issue a statutory notice of demand under s. 218 Companies Act 1965 or to file the petition as it was not a creditor within the meaning of s. 217 of the Act. The respondent had adduced enough evidence to dispute the alleged debt.

[2] The disputes between the parties were disputes within the meaning of cl 22 of the sub-contract. Therefore, it was only proper that they be referred to arbitration. The court sitting as a company court should not be used to resolve disputes between the parties.

[3] The application for an injunction was rendered academic as the court had struck out the petition. In any event, the court would have granted the injunction as there was a pending arbitration between the parties.

[Petition struck out.]

Case(s) referred to:

Banfoong Sydney (JM) Sdn Bhd v. MIFC Credit and Leasing Sdn Bhd [1990] 2 MLJ 201 ***(foll)***

Jurupakat Sdn Bhd v. Kumpulan Good Earth Sdn Bhd [1988] 2 CLJ 649 ***(refd)***

Liew Yin Yin Construction Sdn Bhd v. Yata Enterprise Sdn Bhd [1989] 3 MLJ 249 ***(refd)***

Mann & Anor v. Goldstein & Anor [1968] 2 AUER 769 ***(refd)***

Ng Ah Kway v. Tat Kit Enterprise Sdn Bhd [1986] 1 MLJ 34 ***(refd)***

NKM Development Sdn Bhd v. Irex Sdn Bhd [1980] 1 CLJ 65 ***(refd)***

Pembenaan Leow Tuck Chui Son's v. Dr Lela's Medical Centre Sdn Bhd [1995] 2 CLJ 345 ***(refd)***

Re King's Cross Industrial Dwelling Company [1870] 11 LR Eq 49 ***(refd)***

Re Lympne Investments Ltd [1972] 2 AUER 385 ***(refd)***

Willesford v. Watson [1873] LR Ch 473 ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 217, 218

For the petitioner - M/s Sykt Kam Woon Wah
For the respondent -M/s Raja, Darryl & Loh

Reported by Izzaty Izzuddin

JUDGMENT

Arifin Jaka J:

By way of notice of motion at encl. 8 dated 21 March 1998 Cygal Berhad, ("the respondent company") seeks for an injunction to restrain Syarikat Lian Ping Enterprise Sdn. Bhd. ("the petitioner") from pursuing further with the petition filed herein and to strike out the petition.

The winding up petition herein was filed by the petitioner on 26 January 1998 on the failure of the respondent company to pay the sum of RM3,215,358.53 to the petitioner pursuant to a notice of demand issued under s. 218 of the Companies Act 1965 (the Act) requiring the applicant company to pay within three weeks of receipt of the notice. The sum of RM3,215,358.53 as stated in the notice is made up as follows:

(a) RM3,135,451.31 ("principal debt") being the outstanding balance due on Architects Interim Certificate Nos 12 – 19 issued by the architect.

(b) RM74,907.22 being financing charges on the principal debt calculated at the rate of 8% per annum from 13 September 1997 (being the due date for payment of the last certificate) to 30 December 1997, and

(c) RM5,000 being legal costs.

The petition is based on the sole ground that the respondent company was unable to pay its debts under s. 218 of the Act, and in the circumstances it is just and equitable that it should be wound up.

The application to strike out is founded on the grounds that the debt claimed by the petitioner is disputed and that there are disputes between the parties which have been referred to arbitration in pursuance of an arbitration clause contained in the sub-contract entered into between the petitioner and the respondent company.

The respondent company was employed by Skyline Tower Sdn. Bhd. ("the employer") under a building contract dated 26 June 1995 ("the main contract") for the execution and completion of structure works to a proposed hotel known as Grand Bluewave Hotel to be erected on Lot Nos. 2903, 4463, 4465 and 4466 at Jalan Bukit Meldrum, Johor Bahru. The contract is in the form of a standard contract issued under sanction of Pertubuhan Arkitek Malaysia.

Various sub-contractors were nominated by the employer to execute other works under the main contract. One of the sub-contractors is the petitioner. It was nominated as a sub-contractor to the respondent company. The petitioner and the respondent company entered into an agreement dated 12 April 1996 ("the sub-contract") whereby the petitioner was engaged for the execution and completion of interior fitting out works for suites/corridors (Level 8-20) for the proposed hotel ("the sub-contract works") for a lump sum cost of RM8,380,019.

The alleged principle debt claimed by the petitioner as stated in the notice of demand is based on certificates Nos. 12 – 19 issued by the architect pursuant to cl. 11 of the sub-contract. Clause 11(a) of the sub-contract requires the respondent company from time to time, to apply to the architect subject to and in accordance with the main contract for certificates of payment and for the inclusion therein of the amount which at the date thereof fairly represents the total value of the sub-contract works. Clause 11(b) provides that within 14 days of the receipt by the respondent company of such certificate or duplicate copy thereof from the architect the former shall notify and pay to the petitioner the total value certified therein in respect of the sub-contract works less retention money and amounts previously paid.

It is not in dispute that the architect had issued certificates of payment Nos 12 to 19 pursuant to cl. 11(a) to the employer in the main contract which include therein the amount fairly representing the total value of the sub-contract works. The respondent company however is disputing the amount alleged to be due to the petitioner under the annexures to the certificates for payment Nos. 12 – 19. The company alleges that the annexures were not endorsed by

the architect and the amount certified therein is not correct. The respondent company contended that the sum of RM3,135,451.31 claimed by the petitioner as the principle debt is therefore disputed. The other two amounts namely RM5,000 being legal costs and RM74,907.22 being financing charges claimed by the petitioner are also disputed.

Whether The Debt Is Disputed

The pivotal issue to be considered by the court is whether the debt is disputed on substantial ground? In other words the court has to consider whether there is a *bona fide* dispute as to the debt. In this respect it is necessary to scrutinise the evidence available from the affidavits filed by the various parties.

It is clearly shown in the affidavit affirmed by Syed Zain Al-Kudcy bin Dato' Syed Mahmood filed in support of the application (encl. 5) that the respondent company raised the issue of disputing the debt right from the time of receiving the notice of demand dated 30 December 1997. The respondent company's solicitors wrote a letter in response to the notice of demand dated 9 January 1998 (exh. SZ4 – in encl. 5) stating that the respondent company is disputing the principle debt and the purported financing charges and legal costs. The respondent company also alleged in the letter that the petitioner had breached the terms and conditions of the sub-contract in that the petitioner executed the sub-contract works improperly and/or defectively and not to its reasonable satisfaction and delayed in the completion of the sub-contract works. The respondent company referred to cl. 2 of the sub-contract which states:

> The sub-contractor shall execute and complete the sub-contract works subject to and in accordance with the sub-contract to the reasonable satisfaction of the contractor and of the Architect for the time being under the main contract. ...

It is clear therefore that the respondent company as the contractor has every right to raise its dissatisfaction in respect of the sub-contract works. This is exactly what it did in this case. Further the respondent company is also alleging that the petitioner is liable to pay RM35,000 a day as damages for the delay in completing the sub-contract works which caused the delay in completion of the works undertaken by the respondent company under the main contract. The delay is contributed at 15% by the petitioner as clearly stated by the architect in its letter dated 20 August 1997 (See exh. SZ2 in encl. 5).

As a result of the breach the respondent company has incurred and is still incurring losses and damages for which the petitioner is liable under the sub-contract. It claimed that it is entitled to deduct the losses and damages from the amount certified due to the petitioner under the certificates of payment pursuant to cl. 13 which permits the respondent company to deduct or set-off against any money which is due to the petitioner as the sub-contractor.

The respondent company also contended that the certificates issued by the architect are erroneous in that the architect has not taken into consideration direct payments that were made by the employer to the petitioner. The sum of $500,000 was paid by the employer direct to the petitioner on 15 November 1997 as shown in exh. SZ6 in encl. 5. The petitioner contended that the sum of RM150,000 was refunded. Even if it is true that the refund was made it is obvious that the sum of $350,000 is not shown whether this sum has been deducted from the principle debt claimed by the petitioner. It is apparent from the letter dated 17 November 1997 written by the petitioner to the employer (exh. LGL 20 in encl. 13) that pursuant to a meeting between the petitioner, the employer and the architect it was agreed that payments to certificates Nos 18 – 19 which amounts to RM1,1552,848.94 which has been withheld by the employer should be made payable direct to the petitioner with the condition of retaining 30% to be held by the employer. It is clear therefore there is a dispute as to whether this can be done.

The respondent company also highlighted that the employer had made direct payments to the petitioner albeit they are disputed by the respondent company. There was a deduction of the sum of RM251,999.99 from the sum due to the respondent company under certificate No. 15. This sum was paid to Bri-Sun Trading Sdn Bhd a sub-contractor of the petitioner. This payment is evidenced by exh. SNC 8 in encl. 15. There is no evidence adduced by the petitioner that this sum has been taken into account in the computation of the principle debt.

The respondent company had issued a debit note dated 25 January 1997 to the petitioner for materials supplied in the sum of RM27,830. The petitioner disputes this sum and contends that the amount to be deducted only amounts to RM19,285 (see exh. LGL 24 in encl. 23). It is clear therefore there is a dispute on the actual amount of the deduction and there is no proof that the petitioner has taken this into account in the certificates.

It is pertinent to note from exh. "TTS 40A", the annexures to certificate No. 19 that the total works done by the petitioner was valued at RM8,523,484.77 as opposed to RM8,380,019 which is the sub-contract lump sum inclusive of a contingency sum of RM200,000 which may be allowed. It is contended by the respondent company that this figure is incorrect and it is clearly in dispute. I agree with this contention and I hold that there is a dispute in respect of the value of the total sub-contract works done by the petitioner.

The petitioner's claim in respect of the principal debt as stated in the statutory notice of demand was for an outstanding sum due based on the architects certificates for payment under the sub-contract. The learned counsel for the petitioner submitted that such certificates enjoy a special legal status wherein

there is an immediate obligation on the part of the employer, in this case the respondent company, to pay and any alleged deduction or set off must come within the strict words of the sub-contract. The case of *Pembenaan Leow Tuck Chui Son's v. Dr. Lela's Medical Centre Sdn. Bhd* [1995] 2 CLJ 345; [1995] 2 MLJ 57 was referred to. In this case the question to be decided by the Supreme Court was whether there is an obligation upon the employer to pay at once the progress payment claimed under the certificates for payment regardless of any pending dispute. It was decided that the issue whether the right of set-off or counterclaim can be raised in answer to interim certificates depends in each case upon the particular wording of the contract. In this case the court found that although there were seven express provisions in the contract whereby the employer had the right of set-off, none of them were relevant to the set off which was contended. In the instant case it is expressly provided in cl. 13 of the sub-contract as follows:

> The contractor shall not withstanding anything in this sub-contract be entitled to deduct from or set-off against any money due from him to the sub-contractor (any retention money) any sum or sums which the sub-contractor is liable to pay to the contractor under this sub-contract.

The respondent company contends it is entitled to exercise its right to set off under this clause. Unlike in the *Pembinaan Low Tuck Chui and Sons'* case this clause permits the respondent company to refer the dispute to arbitration. Whether it has the right to do so is in dispute and this goes to the core of the petitioner's claim in respect of the principle debt. This is a dispute which has to be referred to arbitration under cl. 22 of the sub-contract.

The respondent company also disputes the legal costs and financing charges claimed by the petitioner. In this respect it is to be noted that the petitioner's claim also include the sum of RM5,000 as legal costs and RM74,907.22 being financing charges on the principal debt calculated at the rate of 8% per annum. The learned counsel for the respondent company submitted that the legal costs in the sum of RM5,000 is arbitrary and exhorbitant. There is no order that this amount is payable and it is only right and proper for the respondent company to dispute this. As regards the financing charges in the sum of RM74,907.22 claimed by the petitioner I find that there is no basis for this claim and is unsupported by any evidence. The petitioner's claim for this amount is not even provided for anywhere in the sub-contract. I therefore hold that this amount too is disputed and has to be finalised either by way of a claim in a civil suit or by arbitration process.

It is common ground that there is no judgment debt on which the claim by the petitioner is founded. The question that arises is whether the petitioner is a creditor and the respondent company a debtor. Zakaria M Yatim J in

Jurupakat Sdn. Bhd. v. Kumpulan Good Earth Sdn. Bhd. [1988] 2 CLJ 649 at 651 said; "Where a petition for winding up is based on a debt which is disputed on substantial ground the petitioner is not a creditor. See *Re Lympne Investments Ltd* [1972] 2 AUER 385 @ 389. If the petitioner is not a creditor, it is not entitled to present a petition or apply for a winding up order. It has no *locus standi* and the petition must fail. See *Mann & Another v. Goldstein & Another* [1968] 2 AUER. 769 @ 771." (See also *Banfoong Sydney (JM) Sdn. Bhd. v. MIFC Credit and Leasing Sdn. Bhd.* [1990] 2 MLJ 201).

It is trite that a winding up petition which is based on a debt which is disputed on substantial ground must fail (See *NKM Development Sdn. Bhd v. Irex Sdn Bhd.* [1980] 1 CLJ 65 and *Ng Ah Kway v. Tat Kit Enterprise Sdn. Bhd.* [1986] 1 MLJ 34, *Re King's Cross Industrial Dwelling Company* [1870] 11 LR Eq. 49).

From the evidence available it is clear and I am satisfied that the respondent company disputed the alleged debt and that in the circumstances the petitioner is not a creditor within the meaning under s. 217 of the Act. It follows therefore the petitioner is not entitled to issue the statutory notice of demand under s. 218 of the Act or to file the petition as it lacks the *locus standi* to do so. The issuing of the statutory notice of demand and the filing of this petition thereafter is indeed an abuse of the process of the court.

Arbitration

There is a pending arbitration proceeding instituted pursuant to cl. 34 of the main contract between the employer and the respondent company to settle the disputes and differences that has arisen under the main contract. The disputes between the employer and the respondent company concerns *inter alia* the issues of whether the employer has the right to effect direct payment to the sub-contractors including direct payment to the petitioner, the withholding of payment by the employer to the respondent company and various costs and expenses and actual damages arising out of unsatisfactory works carried out by the respondent company and the delay in completion of the works. These issues are relevant to the petitioner's claim against the respondent company which is based on the architect's certificates. It is contended by the respondent company that the dispute of the debts claimed by the petitioner on the grounds which had been considered earlier in this judgment, the amount of liquidated and ascertained damages to which it claims and whether it has the right to deduct from payments claimed by the petitioner under the sub-contract have yet to be determined are disputes and differences that have to be referred to arbitration under cl. 22 of the sub-contract which is as follows:

> In the event of any dispute of difference between the Contractor and the Sub-Contractor, whether arising during the execution or after the completion or abandonment of the Sub-Contract Works or after the determination of the employment of the Sub-Contractor under this Sub-Contract (whether by breach or in any other manner), in regard to any matter or thing of whatsoever nature arising out of this Sub-Contract or in connection therewith, then either party shall give to the other notice in writing of such dispute or difference and such dispute or difference shall be and is hereby referred to the arbitration of such person as the parties hereto agree to appoint as Arbitrator or failing such agreement as may be appointed on the request of either party be the President for the time being of the Pertubuhan Akitek Malaysia.

It cannot be denied that the disputes have been referred to arbitration between the parties is still pending (see exh. SZ4, encl. 5).

I am of the view that the disputes between the parties are indeed disputes within the meaning envisaged in cl. 22 of the sub-contract. It is only proper that the disputes be referred to arbitration. The arbitration clause is valid and the contention that the respondent company has taken a step in the proceedings is unacceptable for the application is the only way to compel the petitioner to observe the arbitration agreement. This court, sitting as a company court, should not be used to resolve disputes between the parties. On this aspect it is apt to quote Peh Swee Chin J (as he then was) in *Liew Yin Yin Construction Sdn. Bhd v. Yata Enterprise Sdn. Bhd.* [1989] 3 MLJ 249 – at p. 251 who said:

> For the court to enquire into the disputes would amount to the court adjudicating on the disputes, thereby frustrating the very arbitration agreement which a court should normally act on, per Lord Selborne L.C in *Willesford v. Watson* [1873] LR. Ch. 473 at page 480.

For this reason too I would allow the application and strike out the petition.

Finally I would like to touch in brief whether the respondent company is entitled to an injunction sought for in its application. This remedy is rendered academic in view of the order I have made to strike out the petition. In any event I would have granted the injunction in the circumstances of the case and on the ground that there is a pending arbitration to determine the disputes between parties as it is an abuse of the process of the court in filing the petition and further proceeding with it.

For the reasons stated above the petition is struck out and the petitioner will pay the cost of this application to the respondent company.